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**Glesby Wholesale, Inc. and Teamsters Local No. 853,
International Brotherhood of Teamsters, AFL–
CIO.** Case 32–CA–19146(E) and 32–CA–
19241(E)

November 28, 2003

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On September 4, 2002, Administrative Law Judge Jay R. Pollock issued the attached supplemental decision. The Applicant filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

The issue here is whether the Respondent-Applicant is entitled to attorney's fees and expenses under the Equal Access to Justice Act (EAJA). We conclude that the General Counsel's position as a whole was substantially justified, and that the Applicant is therefore not entitled to an EAJA award.

I. BACKGROUND

The General Counsel's complaint alleged that the Applicant violated the Act by (1) interrogating Russell Johnson on two occasions about his union activity; (2) denying Russell Johnson a day's work because of his union activity; (3) offering to keep Russell's son Eugene employed if Russell would stop supporting the Union; and (4) later terminating Eugene, also because of Russell's union activity.

The judge issued his decision in the underlying case on March 15, 2002, finding the following material facts: The Union began a campaign to organize the Applicant's warehouse and driver employees in September 2001.¹ Russell Johnson was one of the first employees to contact the Union, and he solicited other employees to sign union authorizations cards. On September 20, Russell Johnson happened to be present when the Applicant's general manager, Dennis Scharffenberg, received a copy of the Union's petition for an election. Scharffenberg asked Johnson whether he had any knowledge of the

petition, and Johnson denied having such knowledge. On September 28, Scharffenberg said to Johnson, "By now you've seen the petition, and I hope I have your support."² This time Johnson said he knew about the petition and was partly responsible for it. The judge found, as a matter of law, that Scharffenberg's questioning of Johnson was not unlawfully coercive.

On October 1, 3 days after the second alleged interrogation, Russell Johnson was sent home for the day, allegedly because of his union activity, when he arrived at work late due to a pre-approved doctor's appointment. The Applicant contended, and the judge found, that Johnson was sent home solely due to lack of work.

Eugene Johnson, Russell's son, had been hired in June by the Applicant as a driver. He was terminated on Friday, November 16. At the hearing, the Applicant's witnesses testified that Eugene was told, at the outset, that he was being hired only as a temporary replacement for another driver, Mike Rogers, who was on leave due to injury. Eugene denied that he was told this, as did Russell Johnson. Russell also testified that, in October, the Applicant's operations manager, Robert Avila, told him he could save Eugene's job if Russell would cease his union activity. Avila denied having said this, and the judge credited Avila. The judge credited the Applicant's witnesses, found that Eugene was hired only as a temporary driver during Rogers' disability leave and was not promised permanent employment, and concluded that Eugene was terminated solely because Rogers had returned to work.

Based on these findings, the judge dismissed the complaint.³ The General Counsel filed no exceptions, and the judge's decision accordingly became final.

On May 30, 2002, the Applicant filed its EAJA application, asserting that the General Counsel had no substantial basis for litigating the allegations concerning the interrogations, the denial of work to Russell Johnson, and the termination of Eugene Johnson. However, the Applicant did not seek fees with respect to the allegation that Avila unlawfully offered to keep Eugene employed; nor did the Applicant contend that that allegation lacked substantial justification. In addition, the Applicant has not excepted to the judge's finding—which accordingly becomes final—that the Region had substantial justification for making the allegation that Eugene Johnson was unlawfully terminated. The Applicant rather claims that

² The General Counsel alleged that this statement was implicitly a question as to whether Johnson supported the Union or the Respondent.

³ The judge's underlying decision also addressed objections to the election held on November 2, 2001. The judge upheld a challenge to the ballot of Eugene Johnson, on the ground that he was a temporary employee not eligible to vote.

¹ All subsequent dates are in 2001.

the General Counsel should have moved for dismissal of this allegation at the end of trial.

On July 17, 2002, the General Counsel filed an answer opposing an EAJA award.

II. ANALYSIS

A. EAJA Standards

EAJA entitles an eligible prevailing party in an agency adversary adjudication to an award of attorney fees unless the agency's position was "substantially justified . . . on the basis of the administrative record, as a whole" 5 U.S.C. § 504(a)(1). The Board's rules implementing EAJA specify that an eligible respondent who prevails in a Board proceeding, "or in a significant and discrete substantive portion of that proceeding," may be awarded EAJA fees. NLRB Rules and Regulations Section 102.143(b).

For the purpose of deciding whether the bringing of a case was substantially justified, "[w]hile the parties' postures on individual matters may be more or less justified, the EAJA . . . favors treating a case as an inclusive whole rather than as atomized line-items." *Commissioner, INS v. Jean*, 496 U.S. 154, 161–162 (1990); *C. Factotum*, 337 NLRB No. 1 (2001). Accordingly, the Board does not award EAJA fees for individual complaint allegations on which an applicant might have prevailed, but determines whether the allegations as "an inclusive whole" were substantially justified. And the Board makes that determination at each successive phase or "discrete substantive portion" of the litigation.⁴ E.g., *Quality C.A.T.V. v. NLRB*, 969 F.2d 541, 545–546 (7th Cir. 1992); *Meaden Screw Products*, 336 NLRB 298, 299–302 (2001); *Blaylock Electric*, 319 NLRB 928, 929–932 (1995), *affd.* 121 F.3d 1230 (9th Cir. 1997). Where the General Counsel's position as a whole was substantially justified at a particular stage of the litigation, no EAJA fees for that stage will be awarded, even if certain allegations, considered individually, were not substantially justified at that stage.

An agency's position on a particular allegation is "substantially justified" when the evidence is "what a reasonable mind might accept as adequate to support a conclusion"—i.e., where "reasonable people could differ" on whether the allegation should be litigated. *Pierce v. Underwood*, 487 U.S. 552, 563–566 (1987). See also *Teamsters Local 741*, 321 NLRB 886, 889 (1996); *Jansen Distributing*, 291 NLRB 801 fn. 2 (1988). This standard is not as demanding as "justified to a high degree" or "substantial probability of prevailing." *Pierce*, *supra*;

supra; *Meaden Screw Products*, *supra*; *Galloway School Lines*, 315 NLRB 473 (1994).

"Credibility issues which are not subject to resolution by the General Counsel in the investigative stage of a proceeding on the basis of documents or other objective evidence are, in the first instance, the exclusive province of the administrative law judge. Accordingly, where the General Counsel is compelled by the existence of a substantial credibility issue to pursue the litigation, and thereafter presents evidence which, if credited, would constitute a *prima facie* case, the General Counsel's case has a reasonable basis in law and fact and is substantially justified." *David Allen Co.*, 335 NLRB 783, 784–785 (2001).

B. The Investigatory and Hearing Phases

The Applicant first asserts that the General Counsel had no substantial justification for pursuing most of the allegations to hearing because they were based on credibility conflicts that should have been resolved during the Region's prehearing investigation. However, we need not address the Region's investigation because, as noted above, the Applicant does not challenge the judge's finding that the Region was substantially justified in bringing to hearing the termination allegation involving Eugene Johnson. As the judge noted, this was the most significant allegation in the case. In addition, by not making an EAJA claim with respect to the allegation of Avila's coercive offer to keep Eugene employed, the Applicant implicitly acknowledges that that allegation was also justified. Since these two allegations constitute a substantial part of the entire case, the General Counsel's case as a whole was substantially justified at least through trial. An award of EAJA fees is therefore not warranted for the investigatory and hearing phases of the case.

C. The Posthearing Phase

The Applicant further contends that by the close of the hearing the evidence was so one-sided that the General Counsel should have moved for dismissal at that time of the allegations concerning interrogations and discrimination against Russell and Eugene Johnson.

We agree with the judge that the allegation involving Eugene Johnson's termination did not lose substantial justification in the light of the trial evidence. By the close of the hearing it was undisputed that the Applicant had knowledge of Russell Johnson's union activity before Eugene was terminated. Moreover, as noted above, there was a credibility dispute between Russell Johnson and Avila as to Avila's alleged offer to keep Eugene employed if Russell would discontinue his union activity. As the judge found, other credibility issues remained as

⁴ A separate determination is not required, however, for the EAJA phase. *Jean*, *supra*, 496 U.S. at 162.

to what Eugene was initially told about his job status, and whether he was later told he would be kept on after the disabled employee, Rogers, returned. Furthermore, even if Eugene had only temporary status in his particular job (as the judge found), that fact alone would not have precluded the Applicant's retaining him in a different job after Rogers returned to work.

For all of these reasons, the issue of the Applicant's motivation for Eugene's termination was still in dispute at the end of the hearing, and reasonable minds could differ on the strength of the relevant evidence. Accordingly, the General Counsel was justified in waiting for the judge's decision on this allegation.⁵

As with the investigatory and hearing phases, given the requirement that we treat an EAJA case "as an inclusive whole," our finding that the most significant allegation in the case, Eugene Johnson's termination, retained substantial basis at close of hearing, coupled with the Applicant's implicit admission that the General Counsel was substantially justified in litigating Avila's alleged coercive offer to keep Eugene employed, is dispositive. Because the General Counsel acted reasonably after the hearing with respect to both of these allegations, an EAJA award for the posthearing phase would also be improper, even if we found that the two remaining allegations lacked substantial basis in their own right.

D. The Remaining Allegations

Further, even apart from the requirement that we treat the case as a whole, we find that the General Counsel was independently justified in bringing the other two allegations in the complaint, i.e., unlawful interrogation and discrimination against Russell Johnson.⁶

With respect to the two alleged interrogations—as the Applicant pointed out in its trial brief to the judge, although not in its EAJA pleadings—there was a credibility conflict as to what Scharffenberg said to Russell Johnson on each of the occasions at issue. There was also a question of law as to whether what Scharffenberg allegedly said would have been unlawfully coercive under *Rossmore House*, 269 NLRB 1176 (1984), *affd.* sub nom. *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The alleged interrogations came from the Applicant's general manager, and they allegedly occurred in a context of other related unfair

labor practices. E.g., *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). The issue of credibility was for the judge to resolve. As to the issue of law, reasonable minds could differ.⁷

With respect to the alleged denial of worktime to Russell Johnson, dispositive issues of fact and credibility were established concerning whether he was told he would be able to work the entire day after arriving from his doctor's appointment, the Respondent's actual motive for sending him home that day, and the Respondent's past practice with respect to employees arriving late for medical reasons. As noted above, the other disputed allegations, i.e., unlawful interrogation of Russell and Avila's alleged coercive offer to keep Eugene employed, were also directly relevant here and, both allegations involved credibility issues. Reasonable minds could accordingly also differ as to the strength of this allegation.

For all of the above reasons, we deny the application for EAJA fees.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge.

Dated, Washington, D.C. November 28, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

George Velastegui, Esq., for the General Counsel.
Robert G. Hulteng and *Damon M. Ott, Esqs. (Littler Mendelsohn)*, of San Francisco, California, for the Respondent-Employer.

SUPPLEMENTAL DECISION

JAY R. POLLACK, Administrative Law Judge. On April 30, 2002, the National Labor Relations Board issued a Decision

⁵ Moreover, the General Counsel did not prolong the case by filing exceptions after the judge resolved the credibility disputes against him.

⁶ Member Schaumber does not join his colleagues' analysis of whether the General Counsel was independently justified in litigating the interrogation allegations. Even if we found they lacked substantial basis, given the requirement that we treat an EAJA case "as an exclusive whole," an EAJA award based on either or both interrogation allegations would be inappropriate.

⁷ The alleged interrogations were also directly relevant to the allegations that Russell Johnson was unlawfully denied work and that Eugene Johnson was unlawfully terminated. Again, because this relevance and the issues of fact and law cited above established a substantial basis for bringing the allegation to trial, we need not address the Respondent's contention that the Region made an inadequate prehearing investigation, or the General Counsel's argument that the Respondent waived its EAJA rights by failing to address the alleged interrogations in its written response to the Region's initial inquiry.

and Order in the above-captioned case, adopting my recommended Order dismissing the consolidated complaint.

On May 30, 2002, Glesby Wholesale, Inc. (the Applicant) filed with the Board in Washington, D.C. an application for award of fees and expenses, pursuant to the Equal Access to Justice Act, Pub. L. 96-481, 94 Stat. 2325 (EAJA), and Section 102.43 of the Board's Rules and Regulations. On June 4, 2002, the Board referred the matter to me for appropriate action. Thereafter, the General Counsel filed a timely answer to the application. The Applicant filed a timely reply.

The gravamen of the General Counsel's argument is that, in the underlying unfair labor practice case, the General Counsel's position was substantially justified.¹

EAJA provides that an administrative agency award to a prevailing party certain expenses incurred in connection with an adversary adjudication, unless the agency finds that the position of the Government was "substantially justified." The United States Supreme Court has held that "substantially justified" means "justified to a degree that could satisfy a reasonable person" or "having a reasonable basis in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

In deciding the merits of the application, a brief review of the underlying unfair labor practice case is required.

The consolidated complaint alleged that on or about September 20, and again in September 28, 2001, Dennis Scharffenberg, Respondent's general manager, interrogated Russell Johnson about his and other employees' union activities. The complaint further alleged that in middle or late October, Robert Avila, Respondent's operations manager, offered to save the job of Eugene Johnson, Russell Johnson's son, if Russell Johnson gave up his union activities. The complaint also alleged that Respondent unlawfully refused to allow Russell Johnson to work for 1 day on October 1, 2001. Finally, the complaint alleged that Respondent unlawfully terminated Eugene Johnson's employment on November 16, 2001, because of his father's union activities. Respondent contended that Eugene Johnson was a temporary employee terminated when the employee whom he replaced returned to work.

The hearing was held on January 14 and 15, 2002. On March 15, 2002, I issued my decision recommending dismissal of the case. No exceptions were filed to the decision and on April 30, 2002, the Board adopted my decision and recommended Order.

In dismissing the complaint, I made several credibility resolutions contrary to the evidence presented by the General Counsel and the Charging Party-Union.

The key issue in the case was whether employee Eugene Johnson was a temporary employee as contended by the Applicant. General Counsel presented testimony from Russell Johnson and Eugene Johnson that Eugene was not a temporary employee. Eugene Johnson testified that he was told he could continue to drive a truck for Respondent even after another driver returned from a disability leave. Russell Johnson testified that he was told that he could save Eugene's job if he gave up his union activities. Both Eugene and Russell testified that

they were never told that Eugene was hired as a temporary employee.

However, I found on the basis of documentary evidence that the Applicant had reported to the district attorney that Eugene Johnson was a temporary employee long before the Applicant's employees had engaged in union activities. Further, Respondent presented testimony from two disinterested employee witnesses who supported the testimony of the Applicant's supervisor's that Eugene Johnson was told that he was a temporary hire until another employee returned to work. Based on these factors I did not credit the testimony of Eugene and Russell Johnson. I, therefore, did not credit Russell Johnson's testimony that he was told he could save Eugene's job by abandoning his union activities. Where there was conflict between the testimony of Russell Johnson and Respondent's witnesses, I credited Respondent's witnesses. Further, where there was conflict between the testimony of Eugene Johnson and Respondent's witnesses, I credited the testimony of Respondent's witnesses.

Had I credited the witnesses differently, weighed the facts in a different manner, or drawn different inferences from the evidence, I might well have found that the Applicant violated the Act. See *Mathews-Carlsen Body Works*, 327 NLRB 1167 (1999). See also *Galloway School Lines*, 315 NLRB 473 (1993).

The applicant's failure to raise material defenses or to proffer supporting evidence is relevant in determining whether the General Counsel was substantially justified in proceeding. See *Lion Uniform*, 285 NLRB 249, 253 fn. 32 (1987). It appears that during the investigation of the unfair labor practice cases the Respondent submitted a position letter, declarations from two supervisors and certain documentation. However, Respondent did not submit the documentation that it had submitted to the district attorney. Nor did Respondent present any evidence from two disinterested employee witnesses. Thus, at the time of the issuance of the complaints, it appeared that credibility was a critical issue in the case and that the witnesses presented to the General Counsel by the Charging Party-Union were credible. Had the Applicant made its witnesses available during the investigation, as it did during the hearing, and if it had made relevant documentary evidence available sooner, it is quite reasonable to believe that complaint might never have issued. The Applicant cannot now rely on its own lack of co-operation to support its application for fees under EAJA. See *C. I. Whitten Transfer Co.*, 312 NLRB 28 (1993); *Lion Uniform*, 285 NLRB 249 (1987).

In this case, the General Counsel did not file exceptions after the adverse credibility findings. I find that the General Counsel acted reasonably in not filing exceptions. I, therefore conclude that the General Counsel's position was substantially justified at all stages of the proceeding. *Blaylock Electric*, 319 NLRB 928 (1995), *affd.* 121 F.3d 1230 (9th Cir. 1997).

¹ In view of the disposition of this case, the other issues raised by the General Counsel's answer need not be addressed.

ORDER

Based on the above findings of fact and conclusions of law and on the entire record herein, I issue the following recommended Order²

² All motions inconsistent with this recommended order are hereby denied. If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recom-

IT IS ORDERED that the application for fees and expenses filed by Glesby Wholesale, Inc., be, and it hereby is dismissed.

Dated, San Francisco, California, September 4, 2002.

mended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.